Supreme Court, U.S.
FILED
DEC 1 - 2008
OFFICE OF THE CLERK

No. 08-521

In The
Supreme Court of the United States

GUY ABRAMS, JAMES PIKE, JOEHONNY REESE, JAY JOHNSTONE, BARON OSTERMAN, THOMAS SLADE, LEROY BRAZILE, JAMES WAITES, JEFFREY BATTISON, THOMAS STREICHER, ROBERT WRIGHT, AND VALERIE LEMMIE,
Petitioners,

v.

BESSIE JONES, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL JEFFREY JONES, BESSIE JONES, NATHANIEL JONES, JR., AND TYRIQ A. HOLLEY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

JOHN P. CURP
CITY SOLICITOR
RICHARD GANULIN
Counsel of Record
PETER J. STACKPOLE
NICOLE L. SANDERS
ASSISTANT CITY SOLICITORS

CITY SOLICITOR'S OFFICE FOR THE CITY OF CINCINNATI
ROOM 214, CITY HALL
801 PLUM STREET
CINCINNATI, OH 45202
(513) 352-3329

Attorneys for Petitioners

December 1, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1) Whether the "for all purposes" mandate of Fed. R. Civ. P. 10(c) requires that federal courts accept as true the facts stated in exhibits to a complaint for purposes of evaluating a motion to dismiss.

2) Whether the rule of *Scott v. Harris*, 127 S. Ct. 1769 (2007) (requiring summary judgment reliance on incontrovertible facts established by a public record videotape) also applies to Rule 12(b)(6) motions to dismiss asserting public employees' qualified immunity defense.

3) Whether the substantive due process "malice and intent to harm" standard, rather than the "deliberate indifference" standard, governs judicial review of police officers' on-the-scene immediate reaction to a suspect's need for medical care.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 1

I. THE FEDERAL CIRCUITS HAVE ISSUED CONFLICTING INTERPRETATIONS OF RULE 10(c), FEDERAL RULES OF CIVIL PROCEDURE 1

II. WITHOUT JUSTIFICATION, THE SIXTH CIRCUIT DISREGARDED THIS COURT'S DECISION IN *SCOTT V. HARRIS* AND IGNORED THE INCONTROVERTIBLE FACTS PRESENTED IN A PUBLIC RECORD VIDEOTAPE OF THE INCIDENT 4

III. THE FEDERAL COURTS HAVE ISSUED INCONSISTENT RULINGS ON THE PROPER SUBSTANTIVE DUE PROCESS STANDARD FOR A CLAIM OF FAILURE TO PROVIDE IMMEDIATE MEDICAL CARE TO AN ARRESTEE AT THE SCENE OF AN ARREST 6

IV. CONCLUSION 7

APPENDIX

Appendix 1: List of Interviews 1a

TABLE OF AUTHORITIES

CASES

Carroll v. Yates,
362 F.3d 984 (7th Cir. 2004) 3

Scott v. Harris,
127 S. Ct. 1769 (2007) ..... i, 4

Terrell, et al. v. Larson, et al.,
396 F.3d 975 (8th Cir. en banc 2005) 6

RULES

Fed. R. Civ. P. 10(c) ..... i, 1, 2, 7

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioners' statement of the case provides the facts as established in the exhibits attached by the respondents to their second amended complaint and used as the substantive basis for the complaint (and corroborated by other public record materials). The respondents' statement of the case ignores the allegations in the exhibits and instead relies solely on false lawyer-crafted allegations belied by the exhibits to the complaint (and the other public record materials). Even now before this Court, the respondents fictionalize what occurred on November 30, 2003, when the petitioners responded to a call for service and Nathaniel Jeffrey Jones ("Jones") attacked them.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUITS HAVE ISSUED CONFLICTING INTERPRETATIONS OF RULE 10(c), FEDERAL RULES OF CIVIL PROCEDURE

The respondents try to diminish the significance of the lower courts' refusal to consider the substantive effect of the exhibits they attached to the complaint by falsely representing to this Court that the exhibits did not form the basis for their claims. Even a cursory review of the second amended complaint[1] proves that

---

[1] App. 73a, *et seq.*

the respondents repeatedly relied on the exhibits to form the *substantive* basis for their claims.[2] The respondents substantively cited the exhibits approximately *30 times* in the complaint to form the basis for their claims. See attached exhibit to this reply memorandum identifying the many times the respondents substantively cited their attached exhibits in their second amended complaint. The other false lawyer-crafted allegations in the complaint are emphatically and conclusively belied by the exhibits the respondents cited and attached to the complaint. It is, therefore, again false for the respondents to now suggest to this Court that they did not *substantively* cite the exhibits about 30 times, but rather allegedly cited them for other reasons that they do not bother to specify.

The respondents, however, do concede that "some circuits in some cases have concluded that plaintiffs pled themselves out of court by attaching exhibits to their complaints."[3] Ignoring that other circuits interpret the "for all purposes" language of Rule 10 (c) as it should be interpreted and substantively rely on the exhibits when the pleader substantively relied on the exhibits, in the case at bar the Sixth Circuit differently construed Rule 10(c), limited the rule, and held: "[W]e treat the exhibit as an allegation that the officers *made* the statements in the transcripts and we treat *that* allegation as true."[4] Notwithstanding that the respondents repeatedly relied on the exhibits for

---

[2] App. 112a, *et seq*.

[3] Response to Petition for a Writ of Certiorari, p. 15.

[4] App. 11a (emphasis added).

the substance of the information contained in the exhibits, the Court of Appeals instead held: "Thus, we accept as true that on June 24, 2004 Officer Pike *said* that no officer put weight on Jones's back during the handcuffing process . . . . We do not accept as true, however, that Officer Pike's statement *is* accurate or true."[5]

Therefore, there is no truth whatsoever to the respondents' retroactive assertion that they no longer rely upon the substance of the many exhibits they attached to their complaint. The disingenuous nature of the respondents' position, and their characterization of the petitioners' legitimate effort to assert their qualified immunity defense as "frivolity,"[6] is highlighted by the respondents' repeated mischaracterization of a Seventh Circuit case, *Carroll v. Yates*.[7] In that case, as required by judicial rules, the plaintiff attached an administrative decision to a complaint for the simple purpose of demonstrating that he had exhausted his administrative remedies. For that reason, the Seventh Circuit did not treat as true the propositions within the administrative order.

By contrast, the respondents were not required by judicial rule to attach the many exhibits to their complaint and they were not required to rely on the exhibits for the substance of their allegations if they had some other, good-faith basis upon which to plead.

---

[5] *Id.* (emphasis added).

[6] Response to Petition for a Writ of Certiorari, p. 10.

[7] 362 F.3d 984, 986 (7th Cir. 2004); Response to Petition for a Writ of Certiorari, pp. 10-12, 15-16, 30.

However, the respondents did voluntarily attach the exhibits and they did use the exhibits for the substance of the allegations in the complaint. The reason this litigation is still pending is because the respondents' second amended complaint is demonstrably false and disproves itself, yet the respondents perpetuated that falseness before the trial court and the Sixth Circuit, and now even before this Court.

II. WITHOUT JUSTIFICATION, THE SIXTH CIRCUIT DISREGARDED THIS COURT'S DECISION IN *SCOTT V. HARRIS* AND IGNORED THE INCONTROVERTIBLE FACTS PRESENTED IN A PUBLIC RECORD VIDEOTAPE OF THE INCIDENT

The Sixth Circuit did not mention, discuss, or distinguish this Court's public record videotape decision in *Scott v. Harris*.[8] The respondents oversimplistically argue that since the Sixth Circuit did not mention *Scott v. Harris* then it is not possible to know whether the Sixth Circuit disregarded that decision. The trial court ruling, issued prior to *Scott v. Harris*, accepted without further review the unsubstantiated assertion of respondents' counsel that the public record videotape "would provide a distorted view of events at issue" and did not consider the facts in the videotape when evaluating the petitioners' qualified immunity defense. The Sixth Circuit ruling, issued after *Scott v. Harris*, accepted without further review the trial court's acceptance of respondents'

---

[8] 127 S.Ct.1769 (2007).

counsel's unsubstantiated assertion that the videotape "would provide a distorted view of events at issue."

The false lawyer-crafted allegations in the complaint include, for example, "Officers Pike and Osterman began to savagely beat Plaintiff with their PR-24s"[9] and "As Defendant Police Officers pressed their combined weight on Plaintiff, and he struggled to twist his body from under the crushing weight so that he could breathe, the Defendant police officers exerted additional force, preventing Plaintiff from getting any air, and putting further strain on Plaintiff's heart. After several minutes of struggling and pressing their weight on Plaintiff, the Defendant Officers had Plaintiff face down on the ground . . . . Defendant Police Officers ignored Plaintiff and left him face down in handcuffs while they sought to regain their breath . . . . Defendant Officers did not look to see if Plaintiff was breathing, and took no action to ensure that he could breathe . . . ." These false allegations are belied by the exhibits the respondents cited in their complaint and attached to the complaint. The false allegations are also belied by the public record videotape ignored by the lower courts.

It is unfair and unjust to override police officers' entitlement to qualified immunity from suit by ignoring incontrovertible facts in a public record videotape for no reason other than opposing counsel's unsubstantiated assertion that the videotape "would provide a distorted view of events at issue."

---

[9] App. 89a-90a.

III. THE FEDERAL COURTS HAVE ISSUED INCONSISTENT RULINGS ON THE PROPER SUBSTANTIVE DUE PROCESS STANDARD FOR A CLAIM OF FAILURE TO PROVIDE IMMEDIATE MEDICAL CARE TO AN ARRESTEE AT THE SCENE OF AN ARREST

As the *en banc* Eighth Circuit held (prior to the Sixth Circuit's application of the *deliberate indifference* standard in the case at bar), "every circuit to consider the issue has applied the [*County of Sacramento v.*] *Lewis intent-to-harm* standard to 'those myriad situations involving law enforcement and government workers deployed in emergency situations.'"[10] The medical care allegations in the complaint arose in a situation involving police officers deployed in an emergency situation. If those officers are to be considered potentially liable for committing a constitutional tort subject to substantive due process requirements, that liability should only exist if the officers acted with malice and intent to harm.

By contrast, the Sixth Circuit disregarded that the petitioners had virtually no time and information with which to deliberate and choose between competing alternatives. Evaluating the immediate medical care needs for an arrestee at the scene of an arrest is substantively very different than evaluating the medical care needs of an individual incarcerated in a facility. The rationale for applying the deliberate indifference standard when time and information are adequate to reflect and make unhurried judgments is

---

[10] *Terrell, et al. v. Larson, et al.*, 396 F.3d 975, 979 (8th Cir. *en banc* 2005) (emphasis added).

eliminated in an emergency situation, like the case at bar, where officers on the scene have to make immediate decisions based on incomplete information. Under those circumstances, malice and intent to harm is the appropriate substantive due process standard and fairly balances the respective rights and obligations of responding police officers and arrestees needing immediate medical care.

IV. CONCLUSION

Each petitioner was erroneously denied his qualified immunity defense. Contrary to the requirements of Rule 10 (c) Fed. R. Civ. P., the lower courts ignored exhibits attached to the complaint. Disregarding the rule of *Scott v. Harris*, the lower courts ignored the facts established in a public record videotape. Furthermore, the lower courts did not apply the "malice and intent to harm" substantive due process standard to the respondents' claim that the petitioners unconstitutionally failed to provide medical care even though they were involved in an emergency situation.

For the foregoing reasons, this Court should grant the police officers' petition for writ of certiorari and provide the officers their qualified immunity defense.

Respectfully submitted,

John P. Curp
City Solicitor
Richard Ganulin
Counsel of Record
Peter J. Stackpole
Nicole L. Sanders
Assistant City Solicitors
Room 214, City Hall
801 Plum Street
Cincinnati, OH 45202
(513) 352-3329
(513) 352-1515 Fax
richard.ganulin@cincinnati-oh.gov

Attorneys for Petitioners

APPENDIX

APPENDIX 1

- Pike Interview Ex.1 paragraph 37 page 89a
- Pike Interview Ex. 1, Osterman Interview Ex. 2, Slade Interview Ex. 3, Abrams Interview, Ex. 4, Reese Interview Ex. 5, CPD Policy 12.545 Ex. 6 paragraph 39 page 90a
- Slade Interview Ex. 3 page 91a
- Osterman Interview Ex.2 paragraph 44 page 90a
- Osterman Interview Ex.2 paragraph 47 page 92a
- Pike Interview Ex 1 paragraph 48 page 93a
- Abrams Interview Ex.4 paragraph 49 page 93a
- Slade interview Ex.3 paragraph 50 page 93a
- Johnstone Interview. Ex. 8 paragraph 51 page 93a
- Reese Interview Ex. 5 paragraph 52 page 93a
- Waite Intervew Ex. 9 paragraph 53 page 94a
- Waite Interview Ex. 9 paragraph 54 page 94a
- Reese Interview Ex. 5 paragraph 63 page 98a
- Pike Interview Ex.1 paragraph 64 page 98a
- Waite Interview Ex. 3, Slade Interview Ex. 3 paragaph 64 pages 98-99a
- Battison Interview Ex. 11 paragraph 66 page 99a
- Brazile Interview Ex. 12 pargraph 67 page 99a
- Slade Interview Ex. 3, Abrams Interview Ex. 4, Battison Interview Ex. 11, Johnstone Interview Ex 8. Waite Interview Ex. 9 paragraph 84 page 105a
- Harrison Interview Ex. 16 paragraph 96 page 108a
- Adams Interview Ex. 15 paragraph 97, pages 108-109a
- Reese Interview Ex. 5 paragraph 87 page 106a
- Schulte Interview Ex. 14 paragraph 88 page 107a
- Harrison Interview. Ex. 16 paragraph 96 page 108a
- Adams Interview Ex. 15 paragraph 97 page 109a